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THE

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THE LEGAL TENDER DECISIONS.¹

THE judgments pronounced in the above cases are now the law of the land, subject to the reconsideration of the Supreme Court of the United States. As such they must await the final determination of that tribunal. It is no part of the design of this article to consider the authority of Congress to issue notes and declare them a legal tender. That question has been exhausted by the ability brought to bear on either side. But the reasons assigned for a judicial decision are sometimes more important than the point immediately adjudged. They enter into the body of the law; and may have an unforeseen influence on the course of judicial opinion. It is from this point of view that we propose to notice some of the salient points of *Bronson v. Rodes* and *Hepburn v. Griswold*.

A promise to pay ten dollars, or any other given sum, lawful money of the United States, may be regarded in three different aspects. It may be viewed as a promise to pay the sum of \$10—as a promise to deliver ten pieces of metal, stamped at the mint under the denomination of dollars—or as a promise for the delivery of an amount of bullion corresponding to that which such dollars would contain. Each of these interpretations is not only different from, but inconsistent with, and exclusive of, the others. If the meaning is that the sum of \$10 shall be paid, the contract creates

¹ *Bronson v. Rodes*, 7 Wall. 229; *Butler v. Horwitz*, Id. 258; *Hepburn v. Griswold*, 8 Id. 603.

a debt, which, like other debts, may be discharged in any lawful money corresponding to the numerical amount of the obligation. The kind of money in which the payment is made will be immaterial, if it is duly authorized by law. A gold eagle is, in this aspect of the case, equivalent to ten silver dollars (see *Cushing v. Wells*, 98 Mass. 550, 551), and these again to ten dollars in gold; or the debtor may, if he thinks fit, tender the amount in smaller coin; substituting two half dollars or ten dimes for a dollar, subject to the limitation imposed by the Act of February 21st 1853.

On the other hand, if the contract is construed as a promise to deliver ten silver coins of the denomination of a dollar, the obligation will not be a debt, but for the delivery of goods of a specific kind. Half dollars, gold dollars or eagles, cannot be substituted for silver dollars: *Mervine v. Sailor*, 5 Phila. R. 422, 433. Whether dollars are or are not coined at the mint, the debtor must procure them at his peril, or undergo the consequences of a default. The creditor cannot maintain debt, but must sue in covenant or assumpsit, and call in a jury to assess the damages. A judgment cannot be taken under the law of Pennsylvania for want of an affidavit of defence. The very pieces for which the obligee has stipulated must be given, and nothing else. This results, not less from the import, than from the form of such an obligation. If the dollars are wanted to complete a series of coins, a gold dollar or two half dollars will not supply the place of a silver dollar. If they are wanted for exportation to a foreign country, as, for instance, China, it may well be that coin of a greater or less denomination than a dollar will not answer the purpose. This was notoriously the case in former years, when the trade with that country was transacted chiefly in dollars.

But there is a third aspect of the contract, under which it may be viewed as a promise for the delivery of an amount of bullion corresponding to a dollar: *Bronson v. Rodes*, 7 Wall. 229, 250. If so interpreted, and the contract speaks of silver money, gold cannot be substituted, but two half dollars may, for the purposes of the contract, be equivalent to a dollar. Bullion may, moreover, obviously be substituted for coin, because the subject of the contract is not money in either sense of the word, but a given weight of metal.

If the bullion is of the given standard, it need not be pure or

refined; *Bronson v. Rodes*, *supra*, although the judgment in this case may be thought to err in overlooking the distinction between this class of contracts and that first above described.

Whether the amount of alloy should be fixed or follow the variations of the coinage, is a more difficult question; but if the contract were for silver dollars, gold bullion obviously would not be a fulfilment of the contract.

There can be no doubt as to which of these interpretations should be put on a contract payable in lawful money of the United States. A promise to give a dollar is not in common acceptation, or in the legal sense of the term, a promise to give a specific coin. It may be fulfilled by the delivery of two half dollars or of ten dimes. Nor is it a promise to deliver an amount of gold or silver corresponding to that which the dollar contains. The promisee may demand money and refuse to receive bullion. It is a contract to pay the sum of one dollar in lawful money; and whatever legally constitutes that sum at the time when the payment is made will be a performance of the contract. The law has long been established on this basis; and if the decisions are not more numerous, it is simply because the point has been regarded as too obvious to be called in question.

The doctrine has been more than once exemplified in the financial history of the United States. The weight of the gold eagle was reduced by the Act of February 21st 1853, from 270 grains to 258, and the value diminished in a corresponding ratio; and yet no one thought of contending that eagles coined after the passage of the act were not a legal tender for all subsequent debts. This result was the more remarkable because the statute was not worded retroactively except in containing a provision that the gold and silver coins issued previously "should continue to be legal tenders on the same terms as if they were of the new coinage" which the act established. The loss to the debtor was obviously considerable, amounting to nearly one dollar out of every twenty-two; and the silence of the reports may be regarded as conclusive that the point was not thought tenable by the courts or the profession. Such is also the well-recognised rule in England, where, throughout changes that have been made in the coinage either by the king or Parliament, it has always been conceded that in determining whether money is a lawful tender, regard must be had to the time of payment, and not to that when the

contract was made. The only instance to be found in the books is the case of *Mixed Moneys*, Davies' R. 50, where a bond conditioned for the payment of 100*l.* sterling was held to be payable in the debased coin which Queen Elizabeth had made a legal tender during the interval. General acquiescence in a matter that concerns every man is the strongest proof that can be given of public sentiment in countries where the courts and press are free. Accordingly, it cannot be surprising that when the question arose in our own time under the recent Acts of Congress, the decisions should have been uniform, with one singular exception, that if Congress were authorized to issue paper currency and make it a legal tender, debts contracted on a specie basis might be paid in paper. The law was so held in a series of cases which will be found reported in 2 P. F. Smith 9, where all the judges would seem to have concurred in the opinion that to know in what money a debt should be paid, we must consider what the currency is when the payment is made, and not what it was when the debt was contracted. "I do not perceive," said STRONG, J., "any force in the objection that the Act of Congress impairs the obligation of private contracts. The objection is not founded in fact. It assumes at its start false premises. It assumes that an engagement to pay money is the assumption of an obligation to pay the kind of money recognised by law when the engagement was undertaken, or, if not that kind, money of equal intrinsic value in the market. But this is a mistaken meaning given to the contract. A promise to pay money made before February 25th 1862 was not a promise to pay gold or silver, much less a promise to pay a weight of gold or silver then defined. If there is anything settled, it is that a contract to pay money is satisfied according to its meaning by the payment of that which is money when the payment is made. I refer for this to Davies's Rep. 28; *Barrington v. Potter*, Dyer 81 b. folio 67; *United States v. Robertson*, 5 Peters 644; *Faw v. Marsteller*, 2 Cranch 20. No one ever thought that a debt of \$1000, contracted before 1834, could not be paid by 100 eagles coined after that year, though they contained no more gold than 94 eagles, such as existed when the debt was made. Every contract is necessarily subject to the power of the government, whatever that may be, over the currency, and the obligations of the parties are undertaken with reference to that power."

Instead of contracting for money, in the ordinary and legal sense of the term, the parties may, however, obviously contract for specific coins, and if apt words are used to manifest such a design, full effect will be given to it by the law. The intention must, however, appear, and will not be inferred from terms which, like dollars, sovereigns, and shillings, &c., in their ordinary acceptance, signify money, although capable of being used in another sense, because such an interpretation would tend, in the great majority of instances, to defeat the true object of the contract. A man who promises to give ten dollars for a hat, does not by so doing bind himself to give ten coins of that denomination, but simply to give ten dollars in any lawful coin. A promise to pay ten gold dollars is within the same principle. Even if the adjective gold excluded silver, the purchaser would still be at liberty to tender an eagle instead of the dollars which the contract literally requires, showing that what the parties have in view is money and not coin: *Shollenberger v. Brinton*, 2 P. F. Smith 9. Nor will it make any difference, under the decisions in Pennsylvania, that the contract prescribes the weight of the dollars in which the payment is to be made. In *Mervine v. Sailor*, 5 Phila. R. 422, 2 P. F. Smith 9, the promise was to pay \$570 lawful money of the United States, each dollar weighing 17 pennyweights and 6 grains at least, but the court held that the payment might be made in gold dollars or silver dollars, weighing 17 pennyweights 12 grains, or in the treasury notes of the United States, or, in short, in any money which was legally equivalent to the \$570 mentioned in the contract. The same rule was applied to a certificate of deposit of "gold payable in like funds with interest," and to a note promising to pay a sum certain, but marked in the margin "\$14,145 specie." In like manner, in *Johnson v. Vicars*, 1 Duvall (Ky. Rep.), the court held that a promise to pay \$420 in gold or silver, was a promise to pay 420 dollars, and that the judgment must follow the promise and be generally for dollars.

The cases in Massachusetts are not less strong in the same direction. In *Woods v. Bullens*, 6 Allen 516, the suit was on a "promise to pay five hundred dollars on demand, payable in specie." The plaintiff contended that five hundred dollars in specie meant five hundred specie dollars, and that he was entitled to judgment for the amount which such dollars would have brought if exposed for sale when the note fell due. CHAPMAN, J., in

delivering the opinion of the court, observed, that this contention assumed that the specie stipulated for was to be regarded as merchandise and not as money. If it was regarded as money, it was itself the standard of value, and the allegation that one dollar was not equivalent to another was absurd. A silver dollar might be worth more or less in the market than a dollar in gold, but the courts were by law to treat them as money and of equal value. The court had no power to enter a specific judgment, but only for a sum certain in dollars and cents. It was said, in like manner, in *Bush v. Baldrey*, 11 Allen 369, that whether the money, which the defendant had received to the plaintiff's use, was paid to him in gold or notes, he was only answerable for the numerical amount in legal currency. The coined dollar of gold being fixed by law as of the value of a dollar, could not be treated by a judicial tribunal as being of different value. These decisions were cited and approved in *Cushing v. Wills*, 98 Mass. 550, and such has been the general current of decision: *Whetstone v. Colley*, 36 Ill. 328; *Buchegger v. Shultz*, 5 Am. Law Reg. N. S. 95; 13 Mich. 420.

It is on the other hand equally well settled that when the parties contract for coin of a particular kind or denomination, and not for money, the very thing stipulated for must be furnished: *Sears v. Dewing*, 14 Allen 413; *Cushing v. Wills*, 98 Mass. 550. If the contract is for foreign coin it must be procured and delivered; if for domestic coin of a particular year, that and no other will answer the purpose. A promise to deliver a dollar coined in the year 1810 cannot be satisfied by the delivery of a dollar coined in any other year. So, if the contract is for silver dollars of a certain weight and fineness, these and not gold dollars or half dollars, although of the same nominal or actual value, must be supplied under the contract. It will make no matter that dollars of the kind in question are no longer coined and cannot be procured in the market, because the obligor takes the burden of the contract on himself, and must fulfil it at his peril. Accordingly in *The Christ Church Hospital v. Fuechsel*, 2 P. F. Smith 71, the court held that a covenant to pay 32 Spanish milled dollars could not be fulfilled by a tender of anything but the very coin for which the covenant stipulated; and a similar decision was made in *Mather v. Kinike*, 1 P. F. Smith 425, with reference to a covenant to pay 21 Spanish pieces of eight. The

principle was stated with admirable clearness by SHARSWOOD, J., in *Mervine v. Sailor*, 5 Phila. Rep. 422; although the circumstances did not require the application of the principle. A breach of covenant is not excused by the difficulty or impossibility of performance. This was vindicated as a fundamental rule by the Supreme Court of the United States, in *Dermott v. Jones*, 2 Wall. 1, and is equally applicable whether the promise is to build a house or to furnish coin. When, however, the words of a contract admit of two interpretations, the parties may fairly be presumed to have intended that which may be fulfilled in the usual course of business. A man may promise to deliver a coin which the government has ceased to issue, or a coin such as no government has ever issued, and must then submit to the consequences of his own folly or inadvertence. But such an interpretation should not be put on the contract if the words reasonably admit of a different meaning. If the parties intend to stipulate for bullion it is easy to say so in language that cannot be misunderstood. The promise may be in terms to deliver so many pounds, ounces, or pennyweights of gold or silver. And so if the intention is to stipulate for the coinage of a particular year, or for coin equal in weight or fineness to such a coinage. But the use of the word dollar *primâ facie* imports not coin but money, and an intention to use it in any other sense should not be presumed unless the meaning is clear. Otherwise a man, who intends to stipulate for the delivery of that which with adequate means can always be procured, may find himself bound by an onerous obligation that cannot be fulfilled. The question, however, is one purely of intention, and if that can be ascertained, there is no doubt as to the principle.

In *Dutton v. Pailaret*, 2 P. F. Smith 109, the bond sued on was conditioned for the payment of "\$3000, gold coin of the United States, of the present weight and fineness." Here the words "present weight and fineness" clearly indicated such gold coin as the United States then issued, to the exclusion of money in any other form. The contract, therefore, was for coin, not money; and the court held that it could not be fulfilled by a tender of notes, or of any coin not answering to the description in the bond.

It is equally well established on general principles that the damages for the breach of a contract, payable in specific

coin, are to be assessed not in the coin which the defendant agreed to give, but generally for what the coin was worth in lawful money at the time when it was to have been delivered: *Henderson v. McPike*, 35 Mo. 255; *Mather v. Kinike*, 1 P. F. Smith 425; *Dutton v. Pailaret*, 2 Id. 109. In *Mather v. Kinike*, WOODWARD, C. J., said that contracts for specific articles were, if not performed, to be compensated in the currency of the country, according to the value of the articles stipulated for. A contract to "pay 21 Spanish dollars or pieces of eight, each piece of eight weighing 17 pennyweights 6 grains, or so much lawful money of the province of Pennsylvania as shall from time to time be sufficient to purchase 21 such pieces of eight, was as much a contract for a commodity as if it had been for wheat or ingots of gold or silver." Judgment was accordingly given for the value of the Spanish dollars in the legal tender notes of the United States.

It was said in like manner, in *Essex County v. Pacific Mills*, 14 Allen 389, that when rent was payable in silver of a certain fineness, the value of it should be estimated in treasury notes, because these notes are the most common currency in use and most easily procured, and by which it is to be presumed that the debtor will satisfy the judgment. So in *Sears v. Dewing*, 14 Allen 413, which was an action to recover rent due upon a lease, in which the lessee agreed to pay "the yearly rent of 4 ounces, 2 pennyweights and 12 grains of pure gold in coined money," a majority of the court held, that though the gold was by the terms of the contract to be paid in the form of money, yet the contract regarded it as a commodity, and judgment was entered for the value of the gold in treasury notes. For a like reason the judgment on a note payable in gold, ought not to be for gold but for dollars generally, without specifying the kind: *Buchegger v. Shultz*, 5 Am. Law Reg. N. S. 95; 13 Mich. 420.

When, however, the question arose in *Bronson v. Rodes*, 7 Wall. 229, a different conclusion was reached, and one for which there is seemingly no precedent. The suit was on a bond conditioned for the payment of \$1400 in gold and silver coin, lawful money of the United States. The amount was tendered in United States notes and refused by the obligee. Satisfaction was thereupon entered upon the mortgage accompanying the bond by the Supreme Court of New York, and their decree

affirmed by the Court of Appeals. A writ of error was then taken to the Supreme Court of the United States.

The counsel for the appellant contended that there were in fact four legal tender dollars of different values, 1st. The gold coin coined since 1834 of the value of 100 cents, or 100ths of such dollars. 2d. The gold coin coined before 1834 of the value of 106 of such cents. 3d. The existing silver dollar of the value of 103 of such cents. 4th. The treasury note dollar which in December 1868 was worth 75 of such cents.

If the obligor had contracted to deliver 100 gold dollars of the coinage prior to 1834, he could not have discharged the obligation by the tender of 100 gold dollars of the present coinage, unless there was some positive law compelling the court to regard things essentially of unequal value as equal for the purposes of payment. For a like reason he should not be allowed to discharge an agreement to pay 1000 specie dollars by the tender of 1000 paper notes worth only three-fourths of their numerical amount in coin. One question to be determined under these circumstances was, whether the law declaring treasury notes to be lawful money, and a legal tender for the payment of all debts, public and private, was designed to render paper dollars legally equivalent to specie, and an adequate performance of a contract expressly stipulating for payment in coin.

It was obvious that Congress had no such design, and that the act in question did not operate to prevent parties from binding themselves by an express agreement to pay in a metallic currency as distinguished from paper.

It was said on behalf of the defendant in error that if the bond under consideration had been for the delivery of 1400 gold dollars, and not as it was in fact to pay \$1400 in gold or silver coin, it would not have created a debt in the sense either of the common law or of the statute, making treasury notes a legal tender. Such an obligation would regard dollars, not as currency but as articles of traffic or commodities. It could only be performed by the actual delivery of the number and kind of dollars specified in the bond, and the damages in case of non-performance would be the value of such dollars as estimated in legal currency at the time when the breach occurred. But it was contended that the obligation before the court was to pay a sum certain in lawful money of the United States, and that the words gold and silver coin

should either be rejected as inconsistent with the tenor of the contract, or viewed as merely descriptive of that which the law would have implied, to wit, that payment was to be made in the metallic currency, which was then the only one.

Chief Justice CHASE said, in delivering judgment, that the legal import of the phrase "dollars payable in gold and silver coin lawful money of the United States," might be ascertained without much difficulty. Every such dollar was a piece of gold or silver certified to be of a given weight and purity by the form and impress given to it at the mint of the United States, and therefore declared to be a legal tender. Any number of such dollars was the number of grains of standard gold or silver in one dollar multiplied by the given number. A contract to pay a certain number of gold or silver coins, was therefore an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which was certified to contain a definite portion of that weight. It was not distinguishable in principle from an agreement to deliver an equal weight of bullion of equal fineness. It was distinguishable in circumstance only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained in the case of bullion by assay and the scales, while in the case of coins it might be ascertained by count. This construction gave effect to the intention of the parties. Their intent was that the debtor should deliver to the creditor a certain number of gold and silver coins of a certain fineness ascertained by count of coins made legal tender by statute. If paper dollars were a valid tender under such a contract it could only be by the force of the statute. Taking the statute in connection with the general course of legislation on the subject of the currency, it did not require or even admit of a construction that would invalidate express contracts for payment in coin. Duties on imports must be paid in coin, and interest on the public debt in the absence of other provisions must also be paid in coin. An argument was not needed to prove that these positive requirements could not be complied with if contracts between individuals to pay coin dollars could be satisfied by offers to pay their nominal equivalent in note dollars. The merchant who agrees to pay in coin must contract for the coin which he requires. The bank which receives coin from him on deposit contracts to repay it on demand. The messenger who is sent to

the bank or custom-house is under an obligation to pay or deliver the coin according to his instructions. These were all contracts either express or implied to pay coin. It was plain that duties could not be paid in coin if such contracts could not be enforced.

The result was that contracts for the payment of coin dollars could only be satisfied by the payment of coin dollars. They were not debts which could be satisfied by the tender of United States notes.

It remained to determine what judgment should be entered upon a contract for payment in coin. It had been taken for granted that payment could only be made in one description of money. But the Act of 1792 provided, "that the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all accounts in public offices and all proceedings in the courts of the United States shall be kept and had in conformity with these regulations."

This regulation was part of the first coinage act, and had reference to the coins provided for by it. It was, however, a general regulation relating to all accounts and all judicial proceedings. As therefore, two descriptions of money were sanctioned by law, both expressed in dollars and both made current in payments, it was necessary in order to prevent ambiguity and prevent a failure of justice, to regard the regulation as applicable alike to both. When the contract in suit was payable in coin the judgment should be entered in coin dollars and parts of dollars. When the contract was payable in dollars generally, without specifying to what description of currency it referred, judgment was to be entered generally without such specification.

Mr. Justice MILLER dissented from the opinion of the court on the ground that an agreement to pay a given sum of dollars in gold and silver dollars lawful money of the United States was a debt in the common acceptance of the term, and within the meaning of the act by which the notes of the United States were declared to be lawful money and a legal tender for all debts public and private. The specification of the kind of money in which the payment was to be made merely expressed what the law would have implied at the time the contract was made. It did not therefore control the legal effect of the word dollar as the unit of value established by law.

The argument of the Chief Justice in *Bronson v. Rodes* is

not new, and contains nothing that will not generally be conceded. It follows the line of thought which had been drawn by Judge SHARSWOOD with equal clearness, in *Mervine v. Sailor*, 5 Phila. Rep. 422, 432. The authorities agree that a covenant to pay specific coin is not a debt but an obligation of a very different kind. It is, in the language of the Chief Justice, "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, and is distinguishable from an ordinary contract for the delivery of bullion only in the method by which the sufficiency of the tender is to be ascertained." The debtor may, if he thinks proper, substitute ingots of gold or silver for coin, and require the weight and fineness to be tested by assay and the scales.

The Act of July 11th 1862 obviously does not apply to such a contract or render it invalid. It relates exclusively to debts, and a contract to deliver bullion is not a debt but an agreement to furnish merchandise of a particular kind. The anomaly of *Bronson v. Rodes* is not the reasoning of the court, but the conclusion ultimately deduced in giving judgment. Decrees for specific performance are nearly if not quite unknown to the common law. The redress afforded in actions *ex contractu* is an order not that the contract shall be fulfilled, but that the plaintiff shall have compensation in damages for the breach. The contract may be for the delivery of grain, but the judgment is not on that account for grain, but for as much money as the grain would have been worth at the time and place appointed for the fulfilment of the contract. The judgment on a contract for Spanish dollars follows the same rule, and is not for dollars but for the value which the dollars would have had if delivered according to the agreement. There is nothing in a contract for domestic coin to exempt it from this principle or require an anomalous judgment for the things or class of things contracted for. A court of equity may compel the specific execution of a contract for the conveyance of land, but such a decree is seldom, if ever, made where the agreement relates to chattels. The reasons for this course are obvious, and apply with peculiar force at law where judgments are enforced by converting the property of the defendant into that which he has been adjudged to owe. If, for instance, a judgment were rendered against him for wheat, his goods would be sold to the bidder who would give the greatest number of

bushels of wheat, and when the judgment is for bullion or specific coin, the execution must follow and enforce the judgment for bullion or specie. If the reasoning of the Chief Justice is sound, a contract payable in lawful silver money of the United States entitles the promisee to a judgment for silver dollars, which, as we have seen, are worth 3 per cent. more than gold. Such dollars are rarely coined at the mint, and could not be obtained in sufficient numbers to satisfy an execution for a large amount. The inconvenience that might result is obvious, because it would be the duty of the sheriff to give effect to the mandate of the court, and refuse any bid that was not made in silver. The debtor might, it is true, tender bullion as equivalent to coin. But there are many parts of this country where it would be difficult, if not impracticable, to procure a large quantity of silver in any form within the time allowed for the levy and return of a *feri facias*; and if an execution can be issued exclusively for silver, the property of the debtor may be sold for much less than it is worth, and bought in by a rapacious creditor notwithstanding the presence of bidders who are ready and willing to give full value for it in the currency established by law, and the only one accessible to men engaged in the ordinary operations of business. A forced sale is a severe but necessary means of administering justice. The hardship would be real if the debtor were cut off from the ordinary means of payment, and compelled to satisfy the writ in specific coin or chattels. The rule of the common law that judgments shall be general for as much lawful money as will compensate the plaintiff is not less humane than just, and we may doubt the wisdom of the departure from it in *Bronson v. Rodes*.

These remarks apply with equal force to the case of *Butler v. Horwitz*. In that case the suit was on a lease for ninety-nine years executed in the year 1791, and containing the following covenant, "yielding and paying therefor the yearly rent or sum of 15*l.* current money of Maryland, payable in English golden guineas weighing 5 pennyweights and 6 grains, and other gold and silver at their present established rate and weight according to the Act of Assembly." The contract here was clearly for bullion payable in foreign or other coin at the established rate and value according to the law of Maryland as then existing.

The court below gave judgment for \$59.71, being the value of the rent as estimated in the legal tender currency of the United

States. When, however, the question came before the Supreme Court of the United States, that tribunal held that whether the contract be for foreign or domestic coin it equally entitles the creditor to an amount of bullion of the stipulated weight and fineness. The damages should therefore be assessed in lawful gold and silver money of the United States, agreeably to the rule laid down in *Bronson v. Rodes*. The judgment was therefore reversed, and judgment entered in accordance with this principle.

In these instances the constitutionality of the Legal Tender Act was taken for granted, and the turning point of the decision was the nature of the contract as entitling the plaintiff to bullion in the shape of coin. The obligation of the defendant was said not to be a debt in the ordinary acceptation of the term or within the meaning of the statute. In the subsequent case of *Hepburn v. Griswold*, 8 Wall. 603, the suit was on a promise to pay "\$1000 lawful money of the United States." It was therefore a debt, and was held to be such by the court. Yet the judgment was the same, to wit, for gold and silver coin. We may therefore infer that in the opinion of the Chief Justice there is no real distinction between a contract payable in lawful money of the United States and in foreign coin; each being for a given weight of gold or silver, equalling the number of grains of bullion in each coin, multiplied by the whole number of coins contracted for. If this view is sound, a specie dollar of the present coinage is not a legal tender for a debt incurred prior to the year 1834. A promise to pay a sum certain in lawful money of the United States, may be satisfied in any coins which by law make up that sum; but the United States have no more power over a contract for bullion than they have over a contract to deliver wheat. Such a contract is for merchandise, and depends on the law of the state where it is made, or on the law of the state where it is to be performed.

The reason given in *Bronson v. Rodes* for entering a specific judgment, can hardly be deemed sufficient. It is the Act of 1792, directing that the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all accounts in the public offices and all proceedings in the courts of the United States shall be so kept. With all due submission, the motive for laying down this rule seems to have been a different one from that assigned by the Chief Justice. It was to correct the inveterate habit of conducting pecuniary transactions in the

depreciated currency which had prevailed under the confederation. Sales were made and accounts kept, not in dollars and cents, but in pounds, shillings, and pence, having a different value in every state. This practice continued down to our own times, and the traces of it have not wholly disappeared. During the first half of this century the Spanish real held its ground against the dime, and was popularly designated in New York as a shilling, in Pennsylvania as elevenpence or eleven-penny bit, and as nine pence in Massachusetts. The purchaser who bought at retail in New England was told the price in shillings, and an explanation might be necessary to inform him that the vendor had reference to an obsolete coin answering to seventeen cents of our money.

The source of the evil lay far back in the colonial history. It is clearly indicated in the *American Negotiator*, published in 1761, and dedicated to "Samuel Lord Sandys, First Commissioner for trade and the plantations." "The currencies in the colonies have fluctuated and varied so much that they have differed greatly both as to time and place, seldom being the same in two different provinces at a time, and often changing value in the same place. In some of the provinces they have deviated so much from sterling money in the way of reckoning their moneys, and run to such a degree of depreciation, that two shillings sterling have become equal to one pound currency, or one pound sterling equal to ten pound. At Boston, in New England, they run on in a continual course of depreciation in the space of forty-seven years in an irregular progressive advance from 133*l.* currency for 100*l.* sterling to 1100*l.* currency for 100*l.* sterling." (Page 60). The General Court afforded a partial remedy by cancelling the depreciated bills and issuing others for money actually borrowed, after which the legal rate of exchange was fixed at 133*l.* currency for 100*l.* sterling, while the Spanish dollar was rated at six shillings. A Massachusetts shilling was consequently worth three-fourths of the English coin of the same denomination. See Palfrey's *Hist. of Mass.*, vol. 2, 403, 525. Felt's *Acct. of Mass. Currency* 31, 45, 131. Similar causes produced a like effect in the other colonies. A pound in Pennsylvania currency was estimated at \$2.66½, or but little more than one-half the value of the pound sterling, and the depreciation was somewhat greater in New York. The currency of Virginia and Maryland stood higher than that of Pennsylvania, but the

disorder reached its height in South Carolina, where 700*l.* currency were required to buy 100*l.* sterling.

A merchant in Philadelphia, who wished to consign goods to Charleston and remit the proceeds to England, had to go through an intricate and laborious calculation, and elaborate tables were prepared to facilitate the process. (See the *American Negotiator* 42, 71.) It was a scene of monetary and financial disorder, which continued under the confederacy, and did not close until after the adoption of the Constitution. Men were slow to abandon the method of computation in which they had been educated for the decimal coinage established by Congress, and thought a bad system, to which they were accustomed, preferable to the inconvenience incident to change.

The pound and shilling continued in general use as the money of account until the close of the century. This was true not only of private transactions, but of those which concerned the public. The transition to dollars and cents took place in the office of the Auditor-General of Pennsylvania in 1797, and seems to have been longer delayed in some of the other states.

Congress might coin money, but could not make the use of it compulsory, nor could they prevent the states or individuals from keeping their accounts in the way they thought preferable. They could, however, and did, require the pecuniary transactions of the government to be conducted in the money established by law. This was the object, and the only object, of the regulation of 1791. It had no reference to coin as such, or to the distinction between coin and paper money. The meaning was that dollars, dimes, cents, and mills, or, in other words, units, tenths, hundredths, and thousandths, should be substituted, where the United States were concerned, for the heterogeneous currency which filled the channels of trade. If the existing dollars were called in and others issued, the regulation would apply equally to these, and so if paper dollars were substituted for coin. The end in view was uniformity, and not the diversity that must inevitably result from the use of different standards of varying and unequal value.

Unquestionably when dues and customs are payable in specie and so collected, the officer is under an obligation to pay over what he receives, and should make a corresponding entry in his books; but it does not follow that the damages are to be assessed specifically in coin if the duty is not fulfilled. A judgment in

1869 for \$1000 in coin would have been an inadequate satisfaction for the misappropriation of a thousand gold or silver dollars in the spring of 1864.

Such a rule would be alike injurious to the creditor and debtor, as tempting the one to speculate on the fall of gold, and depriving the other of what he would have made if the contract had been punctually fulfilled. It is therefore difficult to believe, with the Chief Justice, that, by the use of one and the same term, two different standards of value were intended.

On turning to *Hepburn v. Griswold*, we shall find the divergence from the antecedent course of decision not less marked than in *Bronson v. Rodes*. The court held that if the Act of February 25th 1862 was constitutional for any purpose, it was invalid with regard to antecedent contracts. To make the notes of the United States a legal tender for a debt payable in specie would impair the obligation of the contract, and was beyond the power of Congress. The Chief Justice did not deny that the obligation of a contract might be impaired through the operation of the express powers of government. So much has to be conceded in view of the power to declare war, of the power to establish an uniform system of bankruptcy, of the power to coin money and declare the value thereof. But he contended that when a power not enumerated is made the means of executing an enumerated power, it must be consistent with the spirit of the Constitution. That spirit required the government to maintain, not destroy rights conferred by grant or contract. To compel the creditor to accept less than the amount of the debt, or to compel him to accept something which might bear the same name but was in reality less valuable, was in effect to take private property without compensation, and not in the due course of law. Such an act was therefore beyond the legislative power of Congress.

This distinction may be thought more plausible than sound. Certainly Congress have not been authorized to impair the obligation of contracts. Such a head of power would be a novel one under any form of government. Ordinarily, contracts are regulated by the law of the state where they are made, or the law of the state where they are to be performed, and cannot be varied or controlled by Congress. But the powers of the United States may be carried into execution even when the effect is to impair the obligation of a contract: *Evans v. Eaton*, 1 Peters C. C. Rep.

322; *Shollenberger v. Brinton*, 2 P. F. Smith 9, 70. This is as true of the general government as it would be of the states if there were no prohibitory words. To hold that a measure designed for the common good must fail because it conflicts with an agreement between individuals is contrary to the fundamental conception of government, and subversive of the end for which it is established. Accordingly, no one would maintain that the operation of a certificate in bankruptcy is limited to debts incurred subsequently to the passage of the statute, or that a debt contracted prior to the year 1834 cannot be paid in current coin. And yet the obligation is impaired retroactively in the one instance and discharged altogether in the other. So an agreement in New York to open a credit in London will be at an end if Congress declare war against Great Britain. It may be said that these are express powers. But when an implied power is a necessary and proper means for the execution of an express power, it is as much a part of the express power as if it were conferred in terms. It is therefore settled, that a law may be valid although not authorized expressly and tending to impair the obligation of a contract. An embargo suspends, if it does not dissolve, a contract of charter or affreightment, yet the power of Congress to lay an embargo is as well established as that it results by implication from the commercial power: *Gibbons v. Ogden*, 9 Wheat. 1. The shipper may be ready to forward the goods, and the shipowner under a covenant to receive them, yet either party may plead the statute as a justification for the non-fulfilment of the contract. So the power to draft is not given expressly, and is a mere inference from the power to raise and equip armies. The conscript is obviously released from any obligation which he may have incurred, to do work, devote his skill and labor to the manufacture of goods, or render a personal service of any other description. Yet this was not, so far as I am aware, made a ground of objection in any of the ingenious forensic or judicial arguments against the power.

The provision that private property shall not be taken without compensation or the due course of law, seems equally irrelevant.

Every one will agree with the Chief Justice, that Congress cannot declare that an agreement to deliver 100 bushels of wheat may be fulfilled by a tender of 50 bushels. The reason is, that such contracts belong to the domain of the state legisla-

tion, and are not ordinarily subject to the jurisdiction of the United States. When, however, the contract is drawn within the power of Congress by the insolvency of the vendee; the liability arising under it may be varied or extinguished through the operation of a bankrupt law passed by Congress. This is every day's experience, and yet no one thinks of contending that a discharge in bankruptcy is invalid as taking private property without compensation.

Contracts for the payment of money are by an exception to the general rule subject to the authority of Congress, as it regards the means of payment. This results not only from the power to regulate the currency, but from the terms of every contract which is expressly or by implication payable in the lawful money of the United States.. Plainer language could not be found to indicate the intention of the parties that payment shall be made in such dollars as may be lawful when the time arrives. These may be of greater or of less value, or of a different material, and yet within the terms of the agreement. The power of Congress has accordingly been exercised in various instances in this sense without encountering the objections made in *Hepburn v. Griswold*.

In 1834, 6 per cent. was taken from the weight and value of the gold dollar, and the holders of all debts subjected to a corresponding loss. In 1837 and 1853 the half dollar and smaller silver coins underwent a similar reduction, through which debts not exceeding five dollars lost one-tenth of their value. Was this taking private property without compensation or due process of law? or could that effect be attributed to a law substituting platinum dollars for gold? or providing that the coinage should be debased, by doubling the amount of alloy? If these questions must be answered negatively, it cannot be contended that issuing paper money and making it a legal tender is prohibited by the Fifth Amendment. So a manufacturer may be deprived of needful services by a draft, or a merchant ruined through the operation of an embargo. The right may be secured in either case by contract, and yet the case will not be within the Fifth Amendment. This illustrates the difference between the statutory abrogation of a contract and a law directed to another end and operating incidentally on the contract. An act avoiding a charter-party or contract for services, would clearly be invalid, but a contract may as clearly be dissolved or varied through the

operation of the commercial power or the power to declare war. In like manner Congress could not provide that a contract for one hundred dollars should be satisfied by seventy-five, but may provide that each dollar shall contain 25 per cent. less gold.

I may here advert to another argument used in *Hepburn v. Griswold*, which concerns historical truth not less than the law. It was alleged that an irredeemable paper currency is not a fit or useful instrument for any purpose, and cannot therefore be a necessary or proper means for executing the powers conferred on Congress. This assumption is the hinge on which the judgment turned. We might appeal on this head from the opinion of the Chief Justice to the administration of the Secretary of the Treasury. Leaving the *argumentum ad hominem* on one side, it is more material to observe that the case is not fully stated in the judgment of the court. The choice was not between a redeemable and an irredeemable paper currency, but between an irredeemable currency issued by the government, and an irredeemable currency issued by the banks.

It was not conceivable that institutions which did not redeem their notes during the war of 1812, and thrice suspended payment between 1836 and 1857, could be adequate to the trial which the country was about to undergo. The experience of England, France and Austria, coincides with that of the United States, that a paper currency cannot be maintained on a specie basis during a great political and military crisis. Every thinking man knew that gold and silver would disappear from circulation under the pressure of the rebellion. The practical question was by what means they should be replaced. A paper currency based on the credit of the government was manifestly preferable to a paper currency resting upon the credit of corporations created by the states. We should in this way at least secure uniformity, and avoid the embarrassment that had been occasioned in former years by the unequal rates of exchange between the different sections of the country. Whether the notes of the United States should be made a legal tender was a more doubtful question on which differently constituted minds cannot be expected to agree. But it can hardly be said that the solution reached by Congress is so clearly erroneous that a judge can properly declare it void. If a power can be valid under any circumstances, the question whether it is appropriate to the existing circumstances is political not legal, and does not belong to the judicial province.

J. I. CLARK HARE.